RECORD AND BRIEFS

No. 15-118

Supreme Court U.S.
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In The
Supreme Court of the United States

JESUS C. HERNANDEZ, et al.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE AMNESTY INTERNATIONAL USA, THE CENTER FOR CONSTITUTIONAL RIGHTS, HUMAN RIGHTS FIRST, AND THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are international human rights organizations that engage in litigation, education, and advocacy to promote respect for and adherence to international human rights law and principles by all nations, including the United States. Amici curiae note that the Fifth Circuit's decision in this case eschewed the functional approach mandated by this Court in *Boumediene v. Bush*, 553 U.S. 723 (2008) in favor of a rigid, formal approach that fixated on the fortuity of the exact location of the victim of the cross-border shooting. Amici curiae are concerned that the formal approach adopted by the Fifth Circuit overlooks the obligation of U.S. courts under international law to provide a remedy for all gross violations of human rights. Amici curiae believe that this brief, which sets forth the basis of this obligation, will be of assistance to the Court in deciding whether to grant the petition for certiorari.

More detailed descriptions of the particular mission and interest of each amicus curiae are provided in Appendix A.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief. In addition to amici and their counsel, this brief was prepared with the assistance and financial support of Brent Rosenthal and the law firm of Rosenthal Weiner, LLP, Dallas, Texas. No other person or entity made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The plaintiffs in this case allege that while standing in the state of Texas, a U.S. law enforcement agent fatally shot a fifteen-year-old boy in the head without any provocation and without any conceivable law-enforcement reason for doing so. Were the assailant a private actor, these facts would support a claim for compensation under Texas law. But because the defendant was a government officer acting under color of state law, liability for the boy's death could be imposed only if allowed by the Federal Tort Claims Act or authorized under "clearly established" constitutional principles.

The district court concluded, and the en banc Fifth Circuit agreed, that because the boy happened to be on Mexican soil at the time the fatal shot hit him, the "foreign country" exception to the Federal Tort Claims Act applied to preclude government liability for the boy's death. The Fifth Circuit further concluded that because any constitutional right of an alien without a previous voluntary connection to the United States to be free from the application of excessive force by a government officer was not "clearly established" at the time of the fatal shooting, no constitutional remedy for the boy's unjustified death was available. Under the Fifth Circuit's ruling, the survivors of a boy killed by a U.S. custom agent's arbitrary and shocking use of excessive force have no remedy for his tragic death.

The Fifth Circuit's ruling is intolerable as a matter of conscience and, more importantly for this Court, in violation of basic principles of international law. But the Fourth Amendment's right to freedom from unreasonable seizures is not as territorially limited as the Fifth Circuit supposed. As Petitioners argue and as this Court's opinion in *Boumediene v. Bush*, 553 U.S. 723 (2008) indicates, the constitutional right to freedom from unreasonable seizures is not confined to U.S. citizens or aliens with a "previous voluntary connection" to the territorial limits of the United States, but extends to aliens who are present in areas under the effective control of U.S. law enforcement agencies. By allowing Petitioners in this case to pursue their claim for damages for the border agent's violation of the Fourth Amendment, the Court would clarify that aliens within an area directly adjacent to the United States and actively controlled by U.S. law enforcement are protected by the U.S. Constitution and bring U.S. law into conformity with international legal standards as well.

ARGUMENT

The Court Should Grant Certiorari to Decide Whether International Law Requires the Court to Authorize a Constitutional Remedy in This Case.

I. International Law Establishes That the Arbitrary Execution of a Person Is a Human Rights Violation That Requires a Remedy.

Under international law, all persons have the right to life, liberty, and security. The Universal Declaration of Rights, adopted by the United Nations in the wake of World War II, states simply: "Everyone has the right to life, liberty, and security of person." Universal Declaration of Human Rights (UDHR), adopted Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810, art. 3, (1948), at 71. The International Covenant on Civil and Political Rights ("ICCPR"), a cornerstone human rights treaty to which the United States is a party,[2] provides that no person "shall be arbitrarily deprived of his life" and requires that the "inherent right to life" be "protected by law." ICCPR, art. 6, 999 U.N.T.S. 171 (Dec. 16, 1966).

International law recognizes that a government actor may not arbitrarily deprive a person of the right to life even in law enforcement situations. *See*

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[2] Although the United Nations promulgated the ICCPR in 1966, Congress did not ratify the treaty until 1992. 138 Cong. Rec. S4, 781-84 (daily ed. Apr. 2, 1992).

Restatement (Third) of Foreign Relations Law of the United States § 702, comment f (1987) ("It is a violation of international law for a state to kill an individual other than as lawful punishment pursuant to a conviction in accordance with due process of law, or as necessary under exigent circumstances, for example by police officers in line of duty in defense of themselves or other innocent persons, or to prevent serious crime."). Because the state has an affirmative duty to respect and protect the right to life, it must take steps to prevent arbitrary killings by its own security forces. U.N. Human Rights Comm., General Comment No. 6, ¶ 3, U.N. Doc. HRI/Gen/1 (1982) (observing that "[t]he deprivation of life by the authorities of the State is a matter of utmost gravity"). To be lawful in law enforcement situations, force must be necessary, constitute a last resort, and be applied in a proportionate manner. 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted by U.N. General Assembly, 1990).

Specifically with regard to firearms, Basic Principle 9 states:

> Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.

> In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

Id. (Basic Principle 9).

The founders of this nation recognized the importance of the right not to be deprived of life arbitrarily by the hand of government. As Alexander Hamilton wrote before we gained independence from Great Britain, "[t]o bereave a man of life . . . without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation." The Federalist No. 84, p. 512 (C. Rossiter ed. 1961). More specifically, this Court has recognized that the use of deadly force is permissible only when "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). "A police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Id.* at 11.

At best, the shooting of a Mexican citizen, who was posing "no significant threat of death or physical injury to the officer or others," by a U.S. law enforcement officer just feet from the U.S. border was arbitrary and unjustified. The shooting thus constituted a deprivation of the right to life and an arbitrary execution in violation of international law.

Moreover, under international law, the survivors of a person who has been arbitrarily deprived of the

right to life must have a remedy for the unjustified killing. ICCPR article 2(3) requires the government to "ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy." This obligation includes the duty to "provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law." Basic Principles and Guidelines on the Right to a Remedy and Reparation, U.N. General Assembly, Resolution 60/47, Dec. 16, 2005, art. IX, para. 15; *see also id.*, art. IX, para. 20 ("Compensation should be provided for any economically assessable damage, as appropriate and proportional to the circumstances of each case. . . ."). Ultimately, under international law "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." *The Factory at Chorzow* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A), No. 17 (Sept. 13).

In this case, the Fifth Circuit held that the Federal Tort Claims Act does not allow a suit against the federal government for the unjustified killing because the death, though caused by an act in the United States, actually occurred on foreign soil. *Hernandez v. United States*, 757 F.3d 249, 258 (5th Cir. 2014), *aff'd in part on reh'g en banc*, 785 F.3d 117, 119 (5th Cir. 2015). The court based its holding on the "foreign country" exception in the Federal Tort Claims Act, which Congress included in the Act to prevent the

imposition of liability on the federal government under unfamiliar principles of foreign law incompatible with legal norms in the United States. *Id.*; 28 U.S.C. § 1346(b)(1). Thus, unless Petitioners may pursue a claim for damages based on the violation of constitutional rights, they will be left without any remedy at all for the gross violation of international human rights law that occurred in this case.

II. Recognition of a Constitutional Claim for Damages Would Fulfill the Obligation Under International Law to Provide a Remedy for the Gross Human Rights Violation.

A claim for damages based on violation of the Fourth or Fifth Amendments fills the remedial void in this case. In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the Court recognized that violation of a constitutional right gives rise to a claim for damages independent of any claim arising under state law. The Court there observed that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interest in liberty," and found it "well settled that where legal rights have been invaded, and a federal statute [such as 42 U.S.C. § 1983] provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." 403 U.S. at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

A claim arising under the Fourth or Fifth Amendments is, by definition, governed by constitutional principles developed by courts in the United States. Application of the Constitution to actions taken by a federal officer on American soil is neither unfair nor surprising, and satisfies the international mandate to provide a remedy for the unjustified taking of life without subjecting the federal officer to the vagaries of foreign law.[3]

Amici wish to be clear: damages alone are not an adequate remedy for gross violations of international human rights, such as extrajudicial killings. In other words, the availability of a remedy of the sort sought here is a necessary but not a sufficient condition of the international obligations imposed on a State.

The questions presented by the petition for certiorari ask this Court to decide whether the Fourth Amendment or Fifth Amendment applies to actions taken in the United States that cause a result that occurs on foreign soil in an area effectively controlled

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[3] According to international case law, civil damages are not sufficient or adequate to satisfy the victim's right to any effective remedy. For example, the European Court has held that the State has an obligation to criminally investigate gross violations of human rights and "that obligation cannot be satisfied merely by awarding damages . . . ." *Yasa v. Turkey*, 1998-VI Eur. Ct. H.R. 2411, ¶ 74. Similarly, the Inter-American Court of Human Rights has stated that reparation for violation of a protected right "cannot be restricted to payment of compensation to the next of kin of the victim." *Mapiripan Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 214 (Sept. 15, 2005).

by United States law enforcement officers. Pet. i. As Petitioners point out, good reasons exist for affirming the applicability of U.S. constitutional protections in these circumstances. The opportunity to satisfy the requirement of international law that a remedy be provided for any gross violation of international human rights is one more reason to recognize the applicability of the Fourth Amendment, or alternatively the Fifth Amendment, in this case.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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Amnesty International USA is the largest country section of Amnesty International, a worldwide human rights movement with a presence in over 70 countries and the support of 7 million people throughout the world. Amnesty International works independently and impartially to promote respect for human rights. It monitors domestic law and practices in countries throughout the world for compliance with international human rights law and international humanitarian law and standards, and it works to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated.

The Center for Constitutional Rights ("CCR") is a national nonprofit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Founded in 1966, CCR has a long history of litigating cases that expand access to constitutional and human rights – within and without U.S. borders – particularly to those with least access to them. CCR brought the landmark case, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the foundational case establishing the viability of the Alien Tort Statute as a mechanism to promote transnational justice, and has expanded its use to ensure application of transnational rights against non-state actors, see *Doe v. Unocal Corp.*, 305 F.3d 932 (9th Cir. 2002). CCR has also been a leading advocate ensuring rights for individuals detained outside the United States, serving as counsel for petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), which

held that federal courts have jurisdiction challenges to the legality of indefinite detention at Guantánamo, and for petitioners in *Boumediene v. Bush*, 553 U.S. 723, 769 (2008), which affirmed the principle that certain constitutional rights, such as the Suspension Clause, apply outside the formal territorial borders of the United States and is central to the issues in the instant case. *See also Arar v. Aschroft*, 585 F.3d 559 (2d Cir. 2009) (en banc) (challenging U.S. government's "extraordinary rendition" of an individual to torture in Syria); *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014) (suing private military contractor for its role in torture and abuse of Iraqi detainees in Abu Ghraib).

Human Rights First is a nonprofit, nonpartisan international human rights organization based in New York and Washington, D.C. Since 1978, Human Rights First has worked to protect fundamental human rights. It promotes laws and policies that advance universal rights and freedoms and exists to protect and defend the dignity of each individual through respect for human rights and the rule of law.

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its president, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because it is greatly concerned

about, and seeks to defend, the safety and security of all individuals, regardless of their nationality, from abuses of power at the hands of the government.